No. 86-1098

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

CHARLES DUNN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Question Presented

May the Government have two forfeiture trials to obtain a citizen's money, first through a criminal trial, 21 USC §853, and then, if not successful, a civil trial, 21 USC §881?

TABLE OF CONTENTS.

	Page
Question Presented	i
Table of Contents	ii
Table of Cases	ii
Statement of the Case	1
Reasons for Granting the Writ:	
I. Congress Did Not Intend to Give the Government Two Bites at the Forfeiture Apple	4
A. One Bite is Enough	5
B. Two Bites are Too Much	6
Conclusion	9
Appendix:	
Decision of the United States District Court for the Western District of New York	1a
Decision of the United States Court of Appeals for the Second Circuit	5a

TABLE OF CASES.

United States v. Dunn, 799 F.2d 157 (2d Cir. 1985)	2
United States v. $39,000 in Canadian Currency, 40 Cr.L. 2056 (10th Cir. 1986)	7

Page

STATUTE.

21 U.S.C.:
§846(a) 1
§853 1,2,3,4,5,6,7,8,9
§853(1)(a) 4
§853(d) 8
§881 4,5,6,7,8,9

OTHER AUTHORITY.

Senate Report No. 225, 98th Cong., 2d Sess. (1984), *reprinted in* U.S. Code Cong. & Admin. News 3182 2,7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case

On February 8, 1985, an indictment was returned against Petitioner, Charles Dunn, charging him with one count of attempted possession of cocaine, 21 USC §846(a). Included in the indictment were criminal forfeiture proceedings against separate sums of $4,000. and $28,500. 21 U.S.C. §853. After a two day trial, on May 16, 1985, Petitioner was found guilty.[1]

[1] See Appendix p. 7a.

Then, rendering a special verdict the jury determined that the sum of $4,000. be forfeited, but not the sum of $28,500.[2] Petitioner moved to enjoin this action. On March 19, 1986, the District Court issued a preliminary injunction. *630 F.Supp. 1035.* The Government refused to do so; instead it instituted a civil proceeding against this same money.

The District Court relied on the legislative history of §853, specifically Senate Report No. 225, 98th Cong., 2d Sess. (1984), *reprinted in* US Code Cong. & Admin. News 3182. The Senate Report describes §853 as creating the "option," *id.* at 3380 of criminal forfeiture as an "alternative to criminal forfeiture" *id.* at 3376, that is, the use of criminal "rather then civil," forfeiture. *id.* at 3379. The District Court concluded that:

> The legislative history of the criminal forfeiture provision therefore strongly suggests that §853 should be read to provide the Government with a mutually exclusive choice to seek criminal or civil forfeiture but not both.

(See Appendix p. 4a).

The Second Circuit concluded that the enactment of criminal forfeiture "as an alternative to civil forfeiture" could be read to mean "as a concurrently available alternative".[3] Without frankly holding that it was the

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[2] On July 22, 1985, Petitioner's motion for a new trial on the criminal charges was granted by the District Court. The Second Circuit affirmed. *United States v. Dunn*, 799 F.2d 157 (2d Cir. 1985). On retrial Petitioner was acquitted of the criminal charges.

[3] Beyond a reasonable doubt is required for forfeiture under §853. The Second Circuit, assumed that, absent collateral estoppel, no interest weighed against the Government twice exposing a citizen's property to forfeiture.

intent of Congress to allow both remedies. The Court supposed that if the Government were forced to choose one of these two procedures §853 would go unused and the aspirations of Congress for greater efficiency unfulfilled.

In reaching its conclusions, the Second Circuit gave no express consideration to the consequences for the citizen and Courts, respectively, of defending and conducting sequential forfeiture trials: the Court did not consider the numerous procedural advantages Congress attached to §853 which make this section attractive, even as an exclusive remedy.

By stipulation between the parties the civil action is held in abeyance pending this application.

REASONS FOR GRANTING THE WRIT

I. Congress Did Not Intend to Give the Government Two Bites at the Forfeiture Apple.

The 1984 Statute failed to deal expressly with this issue, compelling both Courts below to address the question of Congress' intent. The frank desire of Congress to simplify criminal forfeiture into an efficient process for prosecutors and the Courts is unmistakable. Where §881 would require, for civil forfeiture, separate trials in each jurisdiction where assets subject to forfeiture may be found, §853 allows a single trial for all. Under §881, parties with an interest in property may appear to contest the forfeiture: this is not possible under §853. This Section also allows merger of criminal and forfeiture claims into a single criminal trial. If the Government is successful, a verdict of *in personam* forfeiture results. §853(1)(a).

Utilization of the procedures in §853 provide for savings of valuable judicial and prosecution resources: one indictment, one set of facts, one party defendant, and one adjudication in place of two or more trials which would otherwise be required.

This case arises because the statute does not, by its terms, *preclude* successive criminal [§853] and civil [§881] proceedings, however apparent the intent of Congress to achieve the economy of a single trial. For that reason, the case involves questions of policy, reason and Congress' intent. Even the Second Circuit agreed that the legislative history "could, of course, be construed to mean 'as a mutually exclusive alternative'," and that there is no affirmative indication in the statute or its history that Congress intended to allow the Government to pursue civil and criminal forfeiture against the same property in a single case.

While one bite of the apple under either section is enough to protect the Government, two bites would defeat Congress' dual concern for efficiency and fairness to the citizen.

A. One Bite is Enough.

The efficiencies allowed by §853 are, as noted above, apparent from the statute. The pre-conviction seizure of assets under §853 increases the amount of property practically available for forfeiture. Nevertheless, proceeding under one statute may be more advantageous than under the alternative in any given case. Each option carries its own special advantages and disadvantages for both the Government and the citizen. If the Government is restricted to an election between §881 or §853, it is not deprived of an adequate remedy. In fact either section provides a full and adequate remedy for the Government.

True, §853 is not an unconditional gift to prosecutors. The advantages to the prosecutor present disadvantages to the accused. The pre-conviction seizure may impair his or her ability to defend the charges or carry on a livelihood; joinder of the forfeiture and guilt determination proceedings may force the owner/defendant to forego testifying in defense of the forfeiture claim because of the over-riding strategy concerns in defending the criminal charge; evidence inadmissible in one action may be introduced in the other. These disadvantages to the accused can only be tolerated if counterbalanced by compelling the prosecution to meet a higher standard of proof.

The Court below opined that if the Government is forced to elect between §881 or §853, the criminal forfeiture section would remain largely unused. This erroneously

supposes that §853 has little advantage to offer except as a supplement to §881.[4]

If the risk involved in a slightly higher standard of proof actually renders §853 unattractive as an exclusive alternative to a §881 proceeding, it is Congress who must correct this in its own way. Instead, the Court below attempted to remove completely the slight risk of the prosecutor [a rhetorically higher standard of proof] of the use of §853 while doubling the risk to the accused.

As such the legislative scheme represents a balance. Although under §881 the Government has a lower standard of proof before it can obtain the assets of an accused citizen, it also has to deal with diffuse or secreted assets and multiple parties. Under §853 the Government has the advantage of consolidated proceedings, less likelihood of the defendant testifying, the spill-over of proof from the criminal trial and pre-conviction seizure.

B. Two Bites are Too Much.

Congress' intuitively struck balance between §853 and §881 would be upset if the Government is allowed a second strike at the accused citizen's money. By enacting §853, Congress intended to strengthen an otherwise awkward and inefficient system: criminal and forfeiture trials are combined; multi-jurisdictional forfeiture trials are avoided; and the number of parties is reduced. It provides the prosecution with two or more apples in one bite! The ruling of the Second Circuit panel fosters inefficiency. Prosecutors are now given the green light to proceed first under §853 [criminal forfeiture], and

[4] The argument of the Court below involves two inconsistent premises: first, that the Government would only use §881 if it had to choose between the two sections. Secondly the Court then supposes that §881 was preserved only as a supplement to §853.

then, if not completely successful, to institute one or more civil proceedings under §881. If Congress' only concern was to give full advantage to the prosecution, without consideration to the impact on Courts or citizens, this decision would be acceptable. However Congress was concerned with saving "valuable judicial . . . resources." Senate Report at 3380, *supra.*

However, Congress' concern for the procedural rights of the accused in §853 is manifest. Is there any suggestion that Congress would concur with exposing the accused not only to the serious disadvantage of a criminal forfeiture trial, but also, if he or she is successful, a second trial seeking forfeiture of the same property? Clearly the answer is no.

Section 853 frankly exposes its punitive purpose. The Senate Report observed that it is an "*in personam* proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant." A successive forfeiture proceeding by a disgruntled prosecutor can only be punitive as well.

If the Government is successful initially in a criminal forfeiture proceeding, it benefits substantially. Why not make the Government quit if it does not succeed there? Allowing the Government to pursue both remedies would be unfair to the citizen and defeat the objectives of Congress. The choice between the utilization of the remedies provided in §853 and §881 is a reasonable one for a mature advocate.

Another circuit has suggested the understanding that the Government must elect between the two proceedings. *United States v. $39,000 in Canadian Currency,* 40 Cr.L. 2056 (10th Cir. 1986). In dismissing *in rem* §881 actions for failing to comply with strict pleading requirements, the Tenth Circuit recognized the choice the prosecution must make:

> Here the Government chose to deploy *in rem* civil proceedings when its action is punitive in nature and intended as a sanction against a person. The Government opted for civil proceedings, which relatively lacks procedural protection, thereby circumventing the more stringent requirements of criminal forfeiture. Consequently, the Government may not be heard to urge considerations going to the criminal nature of the underlying circumstances.

Both the Government and the Court below relied on the difference between the two standards of proof in these forfeiture actions. All this means, simply, is that the doctrine of collateral estoppel may not serve as a bar to the second proceeding. That does not decide this case.

If Congress created a third forfeiture remedy, involving a "clear and convincing evidence" standard, would the Government then be permitted to pursue three successive forfeiture actions against the same property?

The practical difference between the standard of proof under the two sections is minimal. In §853, although the Government ultimately has to prove its case "beyond a reasonable doubt", the joinder of the criminal and forfeiture actions in the same indictment, as noted above, makes it less likely that the accused will testify on the forfeiture issue then if the matter were decided separately under §881. Moreover, §853(d) creates a rebuttable presumption that the property is forfeitable so long as the prosecutor establishes by a preponderance of the evidence that the property is subject to forfeiture. Thus, as a practical matter, even under §853, the prosecutor can succeed merely by tipping the scales on forfeitability.

To the citizen a second trial involves a great penalty. He or she has prevailed under difficult circumstances, at great expense; he or she could be forced to give up this contest which the Government can afford to pursue for purely punitive purposes.

Conclusion

By the enactment of §853, Congress gave formidable advantage to the prosecution, but at substantial cost to the citizen. It is not unfair to expect the Government to pay some price for this advantage, such as a higher standard of proof and foregoing another bite at the apple. Congress failed to repeal §881, not because it was needed as a supplement to §853, nor to provide an insurance policy for prosecutors who elect to proceed under §853. Both statutes were preserved because they provide separate but reasonable choices for the prosecutor toward the same end. One choice is enough. Two would violate the citizen's right to due process of law.

This Court ought to review this case to preserve the benefits Congress sought to achieve together with due process for our citizens who have once already succeeded in defending a §853 forfeiture action by persuading a judge or jury that forfeiture of his or her assets should not obtain.

Respectfully submitted,

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APPENDIX

Decision of the United States District Court for the Western District of New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

CHARLES DUNN.

CR-85-25E.

In this criminal prosecution under 21 U.S.C. §842 the abovenamed individual ("the defendant") had been convicted May 16, 1985 of having willfully and unlawfully attempted to possess a quantity of cocaine with the intent to distribute it. After the jury had returned its verdict, it had been instructed by me to determine whether certain amounts of currency that had been obtained from the defendant by government agents were subject to criminal forfeiture under the provisions of 21 U.S.C. §853(a). The jury then found that $4,000 relating to a February 5, 1985 transaction was subject to forfeiture but that $28,500 relating to a February 6, 1985 incident was not.

The defendant's motion for a new trial under Fed.R.Cr.P. rule 33 was granted by this Court's July 22nd Memorandum and Order. The United States Court

of Appeals for the Second Circuit has affirmed that decision. In the interim the government has taken steps looking towards the civil forfeiture of the $28,500 and the defendant has moved to enjoin such action.

Prior to the enactment of the Comprehensive Crime Control Act of 1984, the only method by which the government could seek forfeiture of property in a case such as this was through a civil action separate from any criminal proceedings. Perceived inefficiencies in that system resulted in the enactment of a criminal forfeiture statute, 21 U.S.C. §853, under which forfeiture proceedings could be consolidated with the trial of the underlying offense.

In the present motion the defendant argues that, if the government chooses the option of consolidating the forfeiture action with the criminal prosecution, it is bound by the jury's verdict denying criminal forfeiture and may not thereafter seek civil forfeiture of the same property in a separate proceeding. The government claims, however, that the criminal and civil forfeiture proceedings are not mutually exclusive.

The relevant statutes, 21 U.S.C. §853 and 21 U.S.C. §881, do not expressly address the issue whether a criminal forfeiture action precludes a subsequent civil forfeiture action concerning the same property. In addition, neither the parties' research nor this Court's investigation has exhumed any case addressing the issue.

The legislative history of the criminal forfeiture statute in issue provides support for Dunn's position. A Senate Report describes the proposed and eventually adopted

amendments as "allow[ing] the use of criminal forfeiture *as an alternative* to civil forfeiture." S.Rep. No. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3376 (emphasis supplied). Addressing the inefficiencies of civil forfeiture, the Senate Report indicates that a way of relieving those problems "would be to allow Federal prosecutors, in appropriate circumstances, to pursue criminal, *rather than civil*, forfeiture in drug cases." *Id.* at 3379 (emphasis supplied). Again addressing the perceived inefficiencies in permitting only civil forfeiture actions, the Report notes that:

> "A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors *the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated* with the prosecution giving rise to forfeiture. In cases where *this alternative* could be pursued, valuable judicial and law enforcement resources could be saved." *Id.* at 3380 (emphasis supplied).

In a section-by-section analysis of the bill, the Senate Report, after detailing the advantages and disadvantages of using civil as opposed to criminal forfeiture proceedings, states:

> "Thus, a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property *and thereby consolidate* the forfeiture action with the criminal prosecution. Section 303 creates such a mechanism." *Id.* at 3393 (emphasis supplied).

The legislative history clearly suggests that Congress's intent was to provide prosecutors with an option to civil forfeiture proceedings and to permit the merger or consolidation of forfeiture proceedings with the prosecution of the underlying charge. The merged or consolidated forfeiture proceeding leaves no other forfeiture mechanism to pursue.

The legislative history of the criminal forfeiture provision therefore strongly suggests that section 853 should be read to provide the government with a mutually exclusive choice to seek criminal or civil forfeiture, but not both. Having sought the criminal forfeiture of $28,500 and a jury having found that such money should not be forfeited under section 853, the government is precluded from now seeking the forfeiture of that sum under section 881.

Accordingly, it is hereby ORDERED that the government is enjoined from seeking the civil forfeiture pursuant to section 881 of the $28,500 at issue in this motion.

Dated: Buffalo, N. Y.
March 18, 1986

JOHN T. ELFVIN
U.S.D.J.

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES of America,
Plaintiff-Appellant,

v.

Charles DUNN,
Defendant-Appellee.

Docket 86-1189.

United States Court of Appeals,
Second Circuit.

Argued Aug. 26, 1986.

Decided Oct. 6, 1986.

The United States applied for criminal forfeiture of two sums of currency, $4,000 and $28,500, allegedly tendered by criminal defendant to Drug Enforcement Agency agents. The jury found that the $4,000 amount was subject to forfeiture but the $28,500 amount was not. The Government then instituted civil forfeiture proceedings against the latter sum. The United States District Court for the Western District of New York, John T. Elfvin, J., 630 F.Supp. 1035, enjoined the Government from prosecuting a civil forfeiture proceeding, and Government appealed. The Court of Appeals, Kelleher, Senior District Judge, sitting by designation, held that Congress did not intend remedies of criminal and civil forfeiture be mutually exclusive, and thus Government may prosecute a civil forfeiture proceeding after a prior criminal forfeiture proceeding has been unsuccessful.

Reversed.

Appendix—Decision of the United States Court of Appeals for the Second Circuit.

Judgment—648

Congress did not intend that remedies of criminal and civil forfeiture be mutually exclusive, and thus Government may prosecute a civil forfeiture proceeding, where prior criminal forfeiture proceeding has been unsuccessful. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§413, 511, as amended, 21 U.S.C.A. §§853, 881.

Salvatore R. Martoche, New York City (Asst. U.S. Atty., of counsel), for plaintiff-appellant.

Joel L. Daniels, New York City, of counsel, for defendant-appellee.

Before FEINBERG, Chief Judge, CARDAMONE, Circuit Judge, and KELLEHER, District Judge.*

KELLEHER, Senior District Judge:

Appellant United States of America appeals from an order enjoining its prosecution in the District Court for the Western District of New York, John T. Elfvin, J., of a civil forfeiture proceeding against the sum of $28,500.

Appellee Charles Dunn was indicted February 8, 1985 on charges of possessing cocaine with intent to distribute. Included in the indictment were applications, pursuant to 21 U.S.C. §853, for criminal forfeiture of two sums of currency, $4,000 and $28,500. These were the amounts allegedly tendered by appellee to Drug Enforcement Agency agents in transactions occurring February 5, 1985 and February 6, 1985.

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* Hon. Robert J. Kelleher, Senior District Judge of the Central District of California, sitting by designation.

Appendix—Decision of the United States Court of Appeals for the Second Circuit.

On May 16, 1985, following a two day jury trial, appellee was convicted of possessing and attempting to distribute cocaine. The trial judge then instructed the jury to determine whether or not the two currency amounts were subject to forfeiture. The jury found that the $4,000 was subject to forfeiture but the $28,500 was not.

On July 22, 1985, appellee's motion for a new trial was granted by the district court. This Court affirmed. *United States v. Dunn*, 779 F.2d 157 (2d Cir.1985). While the order granting a new trial was being appealed, appellant, pursuant to 21 U.S.C. §881, instituted civil forfeiture proceedings against the sum of $28,500, and appellee moved to enjoin such action. On March 19, 1986, the district court issued a permanent injunction, 630 F.Supp. 1035. There followed a timely notice of appeal.

Appellee's prior acquittal under the criminal forfeiture statute merely determined that the government's proof failed to overcome all reasonable doubt that the sum of $28,500 should be forfeited. *See Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917, 921 (1938). Hence, issues of res judicata and collateral estoppel do not arise. *See United States v. National Association of Real Estate Boards*, 339 U.S. 485, 493-94, 70 S.Ct. 711, 716-17, 94 L.Ed. 1007 (1950) (civil antitrust action permissible following criminal acquittal); *Helvering v. Mitchell, supra*, (civil tax assessment permissible following criminal acquittal).

The district court's Memorandum and Order of March 18, 1986, from which the instant appeal is taken, enjoined the government from seeking civil forfeiture of

the $28,500, based on a finding that Congress intended the civil and criminal forfeiture remedies to be mutually exclusive. In arriving at this finding, the district court relied on statements contained in the legislative history of §853, which was enacted in 1984. (21 U.S.C. §881 was enacted in 1970.) Specifically, the court noted the wording of Senate Report No. 225, 98th Cong., 2d Sess. (1984), *reprinted in* U.S. Code Cong. & Ad. News 3182, which referred to §853 as creating the "option," *id.* at 3380 (1984), or the "alternative," *id.* at 3376, of criminal "rather than civil," *id.* at 3379, forfeiture proceedings. Elsewhere, the Report notes that by "consolidat[ing] the forfeiture action with the criminal prosecution," §853 created "a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking." *Id.* at 3393.

Based on these portions of the Senate Report, the district court reasoned:

> The legislative history clearly suggests that Congress's intent was to provide prosecutors with an option to [sic] civil forfeiture proceedings and to permit the merger or consolidation of forfeiture proceedings with the prosecution of the underlying charge. The merged or consolidated forfeiture proceeding leaves no other forfeiture mechanism to pursue.
>
> The legislative history of the criminal forfeiture provision therefore strongly suggests that section 853 should be read to provide the government with a mutually exclusive choice to seek criminal or civil forfeiture, but not both.

Appellant argues that this conclusion overlooks the significance of the differing burdens of proof, which distinguish criminal from civil forfeiture cases. *See, e.g., United States v. One 1977 Lincoln Mark V Serial No. 7Y89A832686*, 453 F.Supp. 1388 (S.D.N.Y.1978) (criminal forfeiture requires proof beyond reasonable doubt as opposed to preponderance standard in civil cases). If put to an irrevocable choice, appellant asserts, the government would opt for civil forfeiture under §881, which allows for proof by a simple preponderance standard. Hence, §853 would remain largely unused and do little to provide for more efficient forfeiture proceedings. Thus, appellant suggests, it frustrates the purpose of §853 to find the remedies of criminal and civil forfeiture to be mutually exclusive.

These contentions have merit. In enacting §853, Congress intended to save "valuable judicial and law enforcement resources," S.Rep. No. 225 at 3380, by eliminating the need for separate duplicative proceedings in every case. The legislative history of §853 consistently reflects the aim of expediting forfeiture of narcotics-related proceeds. The preexisting civil forfeiture provisions, standing alone, were seen to be inefficient; but by failing to repeal or restrict §881 when it enacted §853, Congress envinced an intent to permit continued use of civil forfeiture in a case, as here, where criminal proceedings are unsuccessful.

Those portions of S.Rep. No. 225 relied on by appellee and the district court do not disturb this conclusion. The excerpt describing §853 as "allow[ing] the use of criminal forfeiture *as an alternative* to civil forfeiture," 1984

U.S.Code Cong. & Ad.News at 3376 (emphasis supplied by district court), could, of course, be construed to mean "as a mutually exclusive alternative." However, it could equally well be read to mean "as a concurrently available alternative." In fact, the language is neutral and neither reading is compelled or excluded. Similarly, the mere use of the word "option" to describe criminal forfeiture does not imply that civil and criminal remedies are to be mutually exclusive.

We hold that it was not the intent of Congress that the remedies of criminal and civil forfeiture be mutually exclusive. Accordingly, the judgment of the district court is reversed.